Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

MARJORIE K. JACKSON,

Petitioner,

vs.

JAMES A. SCHEIBEL, in his official capacity as Director of ACTION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In a non-selection disparate treatment case the female employee established a strong prima facie case of sex discrimination. The employer's articulated reason was that the male employee selected had longer service in the state office in which the managerial position was to be filled, although in a lower grade non-managerial position. The female candidate had far longer experience (almost eight years as against two months) in the managerial position in another state, far longer service in the grade and as a supervisor and longer service in the same governmental agency, and the agency policies and practices did not specify service in the particular state as a qualifying factor.

If an employer's articulated reason, though factually true, is not a rational business purpose and is not a qualification under the employer's policies and practices, can it be a "legitimate" reason such as to rebut the prima facie case and meet the employer's burden of production?

Where the employee has established a prima facie case and the articulated reason is not "legitimate" and there is no credibility issue as to the truth of the articulated reason, should the inquiry have ended as a matter of law or is there a remaining fact issue as to intentional discrimination?

LIST OF PARTIES

All parties to the proceedings in this court are as listed in the caption.

James A. Scheibel, the current Director of ACTION was substituted as appellee in the Court of Appeals for Jane E. Kenny, his predecessor in said office, who was originally named as the defendant and then appellee.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Marjorie K. Jackson prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on May 24, 1994.

REFERENCE TO OPINIONS BELOW

The Order of the United States Court of Appeals for the Eighth Circuit affirming the judgment of the District Court, is unpublished and appears in as Appendix A hereto. The Opinion and Judgment of the United States District Court for the Western District of Missouri denying petitioner's claim for sex discrimination and entering judgment for the defendant is not reported and appears in Appendix B. The Order of the Court of Appeals denying Petitioner's Petition for Rehearing and Suggestions for Rehearing En Banc is not reported and appears as Appendix C.

JURISDICTIONAL STATEMENT

This in an action claiming discrimination in employment on the basis of sex, brought by a former employer against ACTION, an agency of the federal government. Judgment was for the defendant.

The appeal to the Court of Appeals was from the Order and Judgment of the Honorable John T. Maughmer, Chief Magistrate Judge of the U.S. District Court for the

Western District of Missouri, dated September 24, 1993. The case was heard by Judge Maughmer by consent of the parties under 28 USC § 636(c)(1). The District Court had subject matter jurisdiction under 42 USC § 2000e-16. The Court of Appeals had jurisdiction pursuant to 28 USC §§ 636(c)(3) and 1291.

The Opinion of the United States Court of Appeals for the Eighth Circuit was entered on May 24, 1994. Petitioner's Petition for Rehearing and Suggestions for Rehearing En Banc were timely filed and were denied on July 5, 1994. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

STATUTE INVOLVED

42 USC § 2000e-16 provides in relevant part:

(a) All personnel actions affecting employees or applicants for employment. . . . in executive agencies. . . . shall be made free from any discrimination based on race, color, religion, sex or national origin.

* * *

(d) The provisions of section 2000e-5(f) through (k) of this title, as applicable shall govern civil actions brought hereunder.

STATEMENT OF THE CASE

ACTION is a federal agency which administers Vista, the Peace Corps and other volunteer programs. Petitioner had been an ACTION State Director for almost eight years when she was displaced by a Reduction In Force. At that point she had life time reinstatement eligibility. After earlier unsuccessful attempts to be reinstated she applied in 1984 for the position of Massachusetts State Director. She was not selected. The male selecting officer chose William Cosby, a male GS-12, who was a grade lower than Petitioner's GS-13.

She brought this action claiming discrimination in the selection on the basis of sex.

The trial court found that Petitioner made a prima facie case (B17) but that the agency articulated a legitimate neutral reason – that Cosby was better qualified because of longer experience in the Agency office in Massachusetts (B17-18) and that Petitioner failed to show that the articulated reason was pretextual and not worthy of credence and failed to meet her third-stage burden of proving that ACTION intentionally discriminated against her on the basis of her sex (B27).

The decision of the District Court was summarily affirmed by the Court of Appeals without opinion (A1).

Although the Court of Appeals stated this to be a fact-intensive case, it is not a case where the court was required to weigh the credibility of witnesses or contradictory evidence. The articulated reason, that the male selected had longer experience in Massachusetts, is accepted as factually true. The following salient facts in

larger part were established by documentary evidence, admissions, answers to interrogatories and testimony and not disputed or contradicted by the agency.

(1) Comparative qualifying experience.

Petitioner had far greater qualifying experience in every relevant category.

As a state program director. Petitioner had almost eight years experience. Cosby's only experience was a temporary appointment for two months.

As supervisor. Petitioner had over eight years supervising six employees. As Missouri State Director she supervised the largest staff in the agency. Cosby had one year supervising three to five employees. All but two months was ten years prior to the selection.

Service in grade GS-13. Petitioner had six years and ten months. Cosby had two months under a temporary promotion and ten months during a period ten years prior to the selection.

Service in the Agency. Petitioner had 13 years and eight months. Cosby had ten years and seven months.

Appraisals. Petitioner's appraisal by McQuiston, her immediate supervisor, covered her last six years and ten months as a GS-13 state director. He rated her the best qualified of the four state directors he supervised. Cosby's appraisal gave him the highest rating but covered only his two months as acting state director in Massachusetts and 28 months in a period ten years prior

to the selection. The ten year gap in which his performance was not appraised included all his service in Massachusetts except the two months as temporary state director. McQuiston a former Regional Director testified that he had examined Petitioner's and Cosby's Personal Qualifications Statements. Based solely on that examination it was his opinion that Petitioner was far better qualified. The agency called no witnesses as to comparative qualifications except the selecting officer, who did not know Petitioner.

Petitioner could have been selected for the position of state director without a competitive selection because of her lifetime reinstatement eligibility.

(2) Agency standards as to qualifications.

Under agency's standards the evaluation gives a weight of 75% to the "type and quality of a candidate's experience in relation to the duties and responsibilities of the position" and 10% to performance appraisals. McQuiston, who as a regional director had evaluated state program directors in four states over seven years, testified that the most significant factors in evaluating a person for state program director are experience in the position and the applicant's grade level. The state director's position is a managerial, supervisory and administrative position. Its duties include developing, conducting and supervising all agency programs in the state. The director is responsible for developing a budget and controlling expenditures. The job requires supervision of three to five employees.

The agency rules required Cosby, because of lack of supervisory experience as a GS-12, to serve a one year probation in the position of state director.

The regulations as to qualifications have no provision giving any special weight to service in the state in which the position is located, as distinguished from service in any other state. Nor was there evidence of any agency policy or practice giving such service special weight. There was evidence that the agency had made numerous selections of state directors whose service was in states other than those in which the position was located.

(3) Cosby's experience in Massachusetts.

Cosby did have longer services in Massachusetts: nine years and nine months against Petitioner's 17 months. However all but two months of this was at grade GS-12, as a program specialist or training specialist. He supervised no employees in either position and neither gave him managerial or administrative experience. Cosby's only managerial experience in Massachusetts was two months as temporary state director. Except for the two months, none of his Massachusetts service except for the two months was appraised in his Personal Qualifications Statement, so the selecting officer had no basis for determining the quality of his performance as a GS-12. Nor under the agency rating standards could that service have been given any weight as a qualification (Agency standards give a weight of 10% to candidate appraisals).

There was no testimony or evidence explaining how Cosby's Massachusetts service in lower grades was of any special value as distinguished from the same experience in another state, or how it could outweigh Petitioner's almost eight years of experience as state director and far superior qualifications in all other respects.

(4) Unexplained Statistical Pattern of Gross Disparities in Number of Female State Directors.

This is a glass ceiling case. Although females were fairly represented in lower grades, there was an unexplained statistical pattern of gross disparities in the number of females promoted to management positions and particularly to GS-13 state director, the lowest managerial grade.

The agency affirmative action plan showed that in 1980 females were 39.6% of grades 11-12 but only 23.1% of grades 13-15, a deviation of 4.23 standard deviations. In 1981 prior to a Reduction in Force there were three state directors appointed, all males. At the time of the RIF there were five female state directors out of 45, or 11.1%. Four state directors were displaced by the RIF. Two were females (Petitioner was one). From the RIF to the 1984 selection only one of 18 state director vacancies was filled by a female. During this period two female directors resigned or retired and were replaced by males. By the time of the 1984 Massachusetts selection the number of state directors had increased to 48 but the number of female directors had dropped from 5 (11.1%) to two (4.2%).

GS-12's were eligible to apply for the position and were the relevant pool of candidates. At the time of the 1984 selection females were 41% of grades GS-12 but only 4.2% of the GS-13 state directors, a deviation of 5.19 standard deviations. *Castaneda v. Partida,* 430 U.S. 482, 469-498 (1977), indicates that the hypothesis that the result was due to random selection would be suspect to a social scientist if the deviation is greater than two or three standard deviations. *Castaneda* holds that such a showing by the employee shifts the burden to the employer "to dispel the inference of intentional discrimination" 430 U.S. at 497-8.

The agency presented no evidence that some factor other than sex caused the demonstrated deviations.

(5) Other undisputed evidence.

In her case-in-chief Petitioner established the following undisputed additional facts which supported her prima facie case and were evidence of pretext and intentional discrimination.

(a) Pre-selection and Grooming

The evidence established a classic case of pre-selection and grooming, defined in *McIntosh v. Weinberger,* 810 F.2d 1411, 1419 (8th Cir. 1987) as giving a favored employee a competitive advantage through choice work assignments, or misuse of noncompetitive details to higher grade work, or interference by a selecting officer in the evaluating and rating process prior to actual selection.

The undisputed facts were strange and unusual. When the vacancy occurred the Regional Director detailed a GS-13 to serve pending the merit selection. Cosby, a GS-12, went over the head of the Regional Director and talked to the National Director. As a result the Director of Domestic Operations, who was also the selecting officer, directed the Regional Director to remove the GS-13, to detail Cosby as temporary state director and to give him a temporary promotion to GS-13. This gave Cosby two legs up on the selection. The assignment gave him experience in the position and he was then evaluated in the position. The appraisal for his two months in the position was the only evaluation of his service in Massachusetts. The prior nine years and seven months was not evaluated.

These actions violated federal regulations which provide that temporary promotions may not be used for the purpose of training or evaluating an employee in a higher grade position.

(b) Prior Pattern of Discrimination Against Petitioner

In the 1981 RIF the Agency used an unreasonably narrow definition of "commuting area" to displace Petitioner instead of one of the three male state directors in the Region, all of whom were junior to her. The Regional Director testified that the commuting area should have been region-wide and that Petitioner should not have been removed. Petitioner had a two year Priority Right to return to the Missouri director position. McQuiston, who "bumped" Petitioner as state director, retired within the

two year period. The agency avoided Petitioner's priority right by detailing the Kansas state director to the position for a period beyond her two year priority period, a length of detail in violation of regulations. It then assigned a male director from another state to the position. Petitioner could have been given this appointment without a competitive selection because of her lifetime reinstatement eligibility.

(c) Agency Affirmative Action Policy Was Ignored

The agency affirmative action policy provided that the selecting officer is responsible for making selections that consider the agency's affirmative action goals. The Selecting Officer was the head of Domestic Operations. He was responsible for pursuing the objectives of the agency affirmative action policy and must have been aware of the gross under-representation of females as state directors. Yet he stated that he gave no consideration to agency affirmative action goals and policies.

(d) Selecting Officer Did Not Seriously Consider Petitioner's Application.

The selecting officer did not interview the candidates and claimed to have relied solely on the Personal Qualifications Statements and appraisals. He had various conversations with regard to Cosby, in connection with Cosby's assignment as acting state director. He did not know Petitioner and his testimony did not indicate that he considered her qualifications or compared them with Cosby's.

(e) Agency's After-the-Fact Cover up.

The agency claimed that Petitioner, although qualified and with life time reinstatement eligibility, was not "eligible" under the ACTION-wide announcement because she was not a current employee of ACTION. The claim was first raised after the selection when she filed an EEOC complaint. The claim was held without merit by the trial court (B15-17). Under other ACTION-wide announcements the agency had selected at least five males as state directors who were not current employees.

REASONS FOR GRANTING THE WRIT

I

The articulated reason, even though factually "true," was not a rational business purpose nor a qualification under the employer's policies and practices and was not a "legitimate" reason such as to rebut the employee's strong prima facie case and meet the employer's burden of production.

The Court is not faced here with the controversy between the Court and the dissent in *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). There is no issue as to the consequence of a false reason by the employer. The issue is as to the consequence of a reason which may be factually correct but does not serve a rational business purpose and does not conform to the policies of the employer as to qualifications. This issue was not addressed by the Court in *Hicks* or earlier decisions and is worthy of consideration. Its resolution in a non-selection

disparate treatment case will further clarify the "sensible, orderly way to evaluate the evidence" prescribed by *McDonnell Douglas*.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) articulated the progression of proof: "First the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection," 450 U.S. at 252-253.

The *McDonnell Douglas* presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case, i.e. the burden of "producing evidence" *Burdine*, 450 U.S. at 254. "[T]he defendant must clearly set forth through the introduction of admissible evidence, reasons for its actions which *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action" Id. at 254-255, and n.8.

This is not a termination case where, as in *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993), the articulated reasons relate to the plaintiff's lack of qualifications, poor performance or misconduct. In such cases the reason is reasonably related to a legitimate business purpose. This is a non-selection case in which the employer's articulated reason and the lower court's finding and conclusion is simply that the male employee was better qualified by reason of longer service in the state in which the position to be filled was located, even though at a lower grade and

without managerial experience. This was not a qualification under the agency's policies and practices and was not a rational business purpose.

A. Employee's Prima Facie Case

The trial court found that Petitioner established a prima facie case (B17).

The undisputed evidence supporting the prima facie case and intentional discrimination was:

(1) Petitioner's qualifications were far superior to Cosby's. She had longer service in the agency, far longer service in grade GS-13, and far longer experience as a supervisor. Most importantly she had far greater experience as a state director, the position to be filled (almost eight years as compared with Cosby's two months).

(2) Petitioner had life time reinstatement eligibility for the position and could have been appointed to the position without a competitive selection.

(3) There was an unexplained statistical pattern of gross disparities in females selected as state directors.

(4) Agency Affirmative Action policies were ignored by the selecting officer.

(5) Cosby was selected and groomed for the position.

(6) There was a subjective evaluation by the male selecting officer.

(7) Petitioner's application was given no serious consideration by the selecting officer.

(8) There was an attempt by the employer to cover up the discriminatory selection by claiming Petitioner was not eligible for the position.

B. What is a Legitimate Reason?

The Court's recurring use of the term "legitimate" in conjunction with the term "non-discriminatory" indicates that the articulated reason must be something more than just non-discriminatory.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255-6 (1981), held that to meet its second stage burden defendant must clearly set fourth a reason "legally sufficient to justify a judgment for the defendant" and "must frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." And, at 450 U.S. 258, "the defendant's explanation of its legitimate reasons must be clear and reasonably specific."

Appellate courts have viewed the employer's burden as "exceedingly light." "The defendant must merely proffer non-gender based reasons, not prove them." *Meeks v. Computer Associates Intern.*, 15 F.3d 1013, 1019 (11th Cir. 1994).

If a reason although "true" is "irrational," can the court infer that it conceals illegal discrimination? The Seventh Circuit thought it could not. *Pignato v. American Trans. Air, Inc.*, 14 F.3d 342 (7th Cir. 1994) said that "If ATA's actual motivation was what they say it was, irrational or not, it is not a pretext. It is not enough for the plaintiff to show that a reason given for a job action is not

just, or fair, or sensible. The employer need not have 'good' reasons, and a mistaken business decision is not on that account a 'pretext.' He must show that the explanation given is 'a phony reason.' "

This Court seemingly disagrees with the circuit decision on this point. *Furnco Construction Corp. v. Water*, 438 U.S. 567 (1978), although holding that the Court of Appeals was wrong in holding that the employer's method of hiring must be that which allows the employer to consider the qualifications of the largest number of minority applicants, did agree with the Court of Appeals holding that Furnco's hiring procedures "must be reasonably related to the achievement of some legitimate purpose" (438 U.S. at 576). In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) the Court said that the burden shifts to the employer to show that the practice has "a manifest relationship to the employment in question" (401 U.S. at 432); the "touchstone is business necessity" (id. at 431).

C. The Articulated Reason Was Not "Legitimate".

We are here dealing with an employer's reason which is factually "true" in the sense that the fact that the male employee had longer service in the state is factually correct. Thus there is no credibility issue as to the truth of the articulated reason. However it is also "false" in that it is not "legitimate" because it is not a rational basis for a finding that the male employee was better qualified.

The trial court found that Cosby's service in Massachusetts made him better qualified (B17-18) because as a G-12 Program Specialist he developed programs for the

state; he would have been familiar with state and local governments; he had current knowledge about the economy and programs in Massachusetts; and his Form 171 showed a "rather remarkable" depth of community spirit.

None of these are specific qualifications under the agency policies and practices. They are generalities which cannot be quantified and cannot outweigh the strong specific qualifications of Petitioner.

Service in the employer's office in the state at a lower, non-managerial position is not a rational nor a "legitimate" business purpose because service in a particular state is not given any special weight by the Agency's policies and practices as to qualifications. The GS-13 state director position is the lowest level requiring managerial experience. Its responsibilities include the administration of the state office and programs, and supervision of a staff of 3-5 professional and clerical employees. Cosby's Massachusetts experience, except for two months, was at Grade 12 in positions which did not give him any managerial, administrative or supervisory experience. As a G-12 without supervisory experience he was required to serve a one year probation as state director.

Thus there was no legally sufficient evidentiary basis for the conclusion that he was better qualified. The reasons stated were not reasonably related to the achievement of the legitimate purpose of obtaining the best qualified employee for the position and had no manifest relationship to the employment in question.

On the undisputed evidence and accepting the truth of the articulated reason, reasonable minds could not defer as to the better qualifications of the Petitioner.

There was no credibility issue remaining and the employer failed to rebut the prima facie case, and did not meet its burden of production.

II

The inquiry should have ended as a matter of law because plaintiff established a prima facie case, the articulated reason was not "legitimate" and there is no credibility issue as to the truth of the articulated reason.

The issue presents the question as to whether *Hicks* requires the inquiry to proceed to the third stage even if there was no credibility issue remaining.

Both Justices Scalia and Souter (in dissent) acknowledged that at all times the plaintiff has the burden to demonstrate the ultimate fact of intentional discrimination, 113 S.Ct. at 2747, 2760. But can that ultimate fact be determined by the prima facie case?

Appellate Courts have held as a matter of law that if there was no direct or circumstantial evidence of discriminatory animus on the part of the employer, the employer is entitled to summary judgment *Le Blanc v. Great American Insurance Co.*, 6 F.3d 836 (1st Cir. 1993); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1964).

But is the converse true? Can the employee be entitled to summary judgment? The law is not clear.

In *Hicks*, 113 S.Ct. at 2742, Justice Scalia stated the rule that no issue of fact remains for the trier of fact to determine if the defendant has failed to meet its burden of production, i.e. has failed to introduce evidence which, taken as true, would permit the conclusion that there was

a nondiscriminatory reason. In that event the Court must award judgment to the plaintiff as a matter of law under FRCP 52(c) in the case of bench trials.

The Court seems to be saying that the inquiry can end. But does a reason which is "true" but not "legitimate" require judgment for the plaintiff? The Court's holding is not clear. Justice Scalia, at 113 S.Ct. 2747, cites with approval the statement from *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) that "if the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted," 450 U.S. at 255, and "drops from the case," id. at 255 n.10. He also stated, at 113 S.Ct. 2747, that although the *McDonnell Douglas* presumption shifts the burden of *production* to the defendant "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," id. at 253.

The Court went on to say, 113 S.Ct. at 2749, that the presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture. The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" because of his race.

Under Court's decision in *Hicks* if, after the proof of a prima facie case the employer articulates no nondiscriminatory reason (i.e. remains silent), the inquiry ends and summary judgment for the plaintiff is required.

It is less clear from *Hicks* whether the articulation of any non-discriminatory reason is a legitimate reason requiring the inquiry to proceed to the third stage. Stated otherwise, does the employer rebut the prima facie case and end the inquiry by articulating *any* "true" reason, however irrational? Justice Scalia said: "By producing evidence (whether ultimately persuasive or not) of non-discriminatory reasons, petitioners sustained their burden of production, and thus placed themselves in a 'better position than if they had remained silent' " 113 S.Ct. at 2748. But in *Furnco Construction Corp. v. Waters*, 438 U.S. at 577 the court said that a prima facie case under *McDonnell Douglas* raises an inference of discrimination "because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissable factors." "[W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reasons, based his decision on an impermissable consideration such as race."

Under *Furnco* it seems that if the inference of discrimination is not rebutted by a legitimate reason for the employment decision the inquiry should end. As Justice Souter said in his dissenting opinion in *Hicks*, 113 S.Ct. at 2758, under *McDonnell Douglas* and *Burdine* proof of a prima facie case not only raises an inference of discrimination, in the absence of further evidence, it also creates a mandatory presumption in favor of the plaintiff.

The presumption should remain intact if the employer's only evidence is not a legitimate reason and the plaintiff should be entitled to judgment as a matter of law.

CONCLUSION

For these reasons a Writ of Certiorari should issue.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3817WM

Marjorie K. Jackson, Appellant, v. James A. Scheibel, in his official capacity as Director of ACTION, Appellee.	*	Appeal from the United States District Court for the Western District of Missouri. [UNPUBLISHED]

Submitted: April 13, 1994
Filed: May 24, 1994

Before FAGG, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

Marjorie K. Jackson appeals from a district court order that denied her relief on her sex discrimination claim following trial. Essentially, the district court found that Jackson was not denied the position she sought because of her sex. Because the controlling law is clear, our review satisfies us that an opinion would have no

precedential value in this fact-intensive case. We further conclude the district court's fact-findings are not clearly erroneous and no error of law appears. We thus affirm the judgment of the district court. *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Marjorie Jackson,	)	
Plaintiff,	)	
	)	**Case No.:**
V.	)	**89-1203-CV-W-BB**
	)	
Jane A. Kenny, In her official capacity as Director of ACTION,	)	**(Filed September 24, 1993)**
	)	
Defendant.	)	

ORDER

Plaintiff Marjorie Jackson brings this action alleging that defendant Jane A. Kenny, in her capacity as Director of ACTION, a federal agency, unlawfully discriminated against her on the basis of her race and her sex. Based on the evidence presented at trial, the court finds in favor of defendant.

I. FINDINGS OF FACT

This court has jurisdiction under 42 U.S.C. § 2000e-16. Plaintiff is a former Missouri State Program Director, GM-13 for ACTION. ACTION is the successor federal agency to VISTA. Defendant Kenny is the director of ACTION, and ACTION is a department, agency or unit of the federal government within the meaning of 42 U.S.C. § 2000e-16(c).

A. The 1981 RIF

On November 14, 1981, plaintiff was displaced from her position as Missouri State Program Director for ACTION through a Reduction in Force ("RIF"). At the time plaintiff was RIF'd in 1981, she was offered continued employment with ACTION as GS-301-7 Volunteer Recruiter with the provision the she retain her GM-13 grade and level of pay. Plaintiff declined this offer and was ultimately separated from ACTION.

In 1981, ACTION abolished all Regional Deputy Director positions nationwide. Regional Deputy Director was the position immediately above State Program Director, the position occupied by plaintiff. At that time, plaintiff was the Missouri State Program Director and she was "bumped" by Harold McQuiston, the former Regional Deputy Director, whose position was eliminated in the 1981 RIF. Mr. McQuiston had greater retention rights than plaintiff for the position of State Program Director and thus, when his position as Regional Deputy Director was eliminated he was moved into the Missouri State Program Director position held by plaintiff.

Region VII, the region for which Mr. McQuiston's Regional Deputy Director position was eliminated, was comprised of Missouri, Kansas, Iowa and Nebraska. The state office for Kansas was located in Topeka, Kansas. Prior to being replaced by Mr. McQuiston, plaintiff worked in the State Office in Missouri at Kansas City. Mr. McQuiston did not displace the State Program Director in Kansas because Topeka was not within his local commuting area and the Missouri State Office in Kansas City was.

Local commuting area is defined as:

> The geographic area which usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and reasonably can be expected to travel back and forth daily to their usual employment.

ACTION Order 351.1 8(f), Defendant's Exhibit # 16. ACTION Director of Personnel Phyllis Beaulieu indicated that the commuting area was limited to the Kansas City area, and although it could have included Topeka, Kansas, it did not.

At the time plaintiff was RIF'd, four other State Program Directors were also RIF'd. Two were males and two were females. Over 2000 employees nationwide were displaced through the 1981 RIF.

Once an employee has been RIF'd, the agency maintains a Reemployment Priority List. Reemployment priority rights are limited to two years and are limited to the employees' commuting area. ACTION order 351.1, Ch. 7, ¶ 44, Defendant's Exhibit # 16. Within plaintiff's two year period, she applied for positions with ACTION in Columbus, Ohio; Charlotte, North Carolina; Santa Fe, New Mexico; and Austin, Texas. These positions were not in plaintiff's commuting area since she lived in Kansas City, Missouri and her reemployment priority rights did not apply to these positions.

The competitive area in which employees compete with each other to determine who will remain in their

jobs and who will be separated may be enlarged; however, the determination of competitive area is negotiated between the Union and ACTION before the implementation of a RIF. ACTION Order 351.1, Ch. 2. Ms. Beaulieu testified that the competitive area was applied uniformly across the nation throughout the 1981 RIF. There was no evidence which indicated that the competitive area was open to negotiation on a case by case basis. Plaintiff had the right to appeal her separation from employment due to the RIF action, but she chose not to do so.

B. Retirement of Mr. McQuiston

Mr. McQuiston, the former Regional Deputy Director who "bumped" plaintiff from her position in the 1981 RIF, retired in July of 1982 from his position as Missouri State Program Director. ACTION then named the State Program Director for Kansas as Acting State Program Director for Missouri until early 1985. There is no requirement that the agency fill every vacancy that occurs. 5 C.F.R. § 7.1.

Ms. Beaulieu testified that when an employee is assigned to do additional duties which are the same as those duties already performed, as in the case of the Kansas State Program Director who became the Acting Missouri State Program Director, it is not considered a personnel action. Under Chapter 300 of the FPM, 300-21, Subchapter 8, 8-4(c)(2), there is no reporting requirement for assignment to perform additional duties.

Plaintiff did not file a complaint of discrimination in connection with the events that transpired after Harold McQuiston retired in 1982 and his position was filled by

an Acting State Program Director. Plaintiff did file an action before the Merit Systems Protection Board alleging discrimination when the Missouri State Program Director position was not filled. That action was unsuccessful.

C. Selection of the Massachusetts State Program Director

In 1984 plaintiff applied for but did not receive the position of Massachusetts State Program Director. Plaintiff claims sex discrimination based on her failure to be selected as the State Program Director for Massachusetts.

Plaintiff was the ACTION Missouri State Program Director, at two different times, for a total of seven years and nine months. Plaintiff also had been a Program Field Analyst for Vista (the predecessor of ACTION) for 17 months in Boston, Massachusetts. During the time plaintiff was in Boston, her supervisor was John Torian. At the time of the selection for the State Program Director for Massachusetts, Mr. Torian was the Regional Director for Region I, which included the state of Massachusetts.

On August 3, 1984, ACTION issued a vacancy announcement for the position of Massachusetts State Program Director, GM-301-13. The "area of consideration" was "ACTION-wide, status candidates only." Vacancy Announcement, Plaintiff's Exhibit # 11. ACTION-wide means that "[a]pplications shall be accepted from career and career-conditional ACTION employees, and temporary ACTION employees who possess either reinstatement eligibility or non-competitive eligibility." ACTION Order 335.4, Chapter 2, Defendant's Exhibit # 4 at 7. A "status candidate" is a person who has

completed a "probationary period under career or career-conditional appointment or was appointed in the competitive service under an authority that did not require probation." FPM, Subchapter 2 at 2-2, Defendant's Exhibit # 19 at 212-7.

Plaintiff submitted her application for this position but was not selected. At the time of plaintiff's application she had lifetime reinstatement eligibility as a career employee; she had status by virtue of her reinstatement eligibility; she had career tenure; and she had non-competitive eligibility for GS-13 positions and below. The above-noted qualities made plaintiff eligible for the position of Massachusetts State Program Director without participating in competitive procedures. Specifically, this meant that plaintiff could apply for the position of Massachusetts State Program Director, meet the minimum qualifications of the position, and be considered for the position without resorting to the competitive process. Non-competitive candidates, such as plaintiff, were not rated or ranked. However, this does not mean that they were more qualified than individuals on the competitive list. An applicant is placed on a competitive list if they have never before held the grade level of the job for which they are applying. All candidates on the competitive list must be rated and ranked by a review panel. However, candidates on the competitive list are not required to take a competitive examination before being eligible for selection.

Initially, there were eleven applicants for the position of Massachusetts State Program Director. One candidate was disqualified by the personnel office. Seven applicants

were competitive candidates and three, including plaintiff, were non-competitive candidates. Three of the seven competitive candidates were female. Plaintiff was the only female non-competitive candidate. The seven competitive candidates were ranked by a review panel of three persons. Of those seven competitive candidates ranked, only the names of the two highest ranking candidates were sent to the selecting official.

Daniel Bonner, the ACTION Associate Director for Domestic Operations, was the selecting official for the position of Massachusetts State Program Director. He was given two lists of candidates, the competitive list of two, and the non-competitive list of three, which included the plaintiff. Mr. Bonner was not given any test scores of the two competitive candidates nor was he provided the Qualifications Rating Worksheet used by the panel members. Mr. Bonner did not inquire as to the test scores of the competitive candidates or seek the Qualifications Rating Worksheets. Mr. Bonner did not participate in the review panel who rated and ranked the competitive candidates or determine who would be placed on either the competitive or non-competitive list.

The weighted evaluation factors used by the committee ranking competitive candidates were listed on the vacancy announcement as follows: Experience, 75 %; Performance Appraisal, 10 %; Training and Self Development, 10 %; and Awards, 5 %. The experience factor included generalized experience in management and experience related to the duties outlined on the vacancy announcement. Experience as a State Program Director was not the sole focus of the review panel.

The duties and responsibilities outlined on the vacancy announcement for the position of Massachusetts State Program Director required the ability to communicate with state and local governments and agencies in Massachusetts, as well as "organizations of business, labor, senior citizens, the poor, community services and volunteer groups . . . ". ACTION Vacancy Announcement, Plaintiff's Exhibit 11.

Mr. Bonner, the selecting official, was located in Washington, D.C. Although he could have chosen to interview all the candidates for the position, he decided to make the selection based only upon the candidates SF-171 Personal Qualifications Statement and supporting documentation. ACTION Order 335.4, ¶ 14, Defendant's Exhibit # 4. It was Mr. Bonner's personal practice to make selections, such as the one at issue, on the basis of the applicants' SF-171 application form without conducting interviews. Thus, when Mr. Bonner made the selection for the position of Massachusetts State Program Director, he had before him the names of the two competitive candidates in alphabetical order, the names of the three competitive candidates in alphabetical order, and each candidates' SF-171, application and accompanying Applicant Appraisal Form for Merit Promotion. Mr. William Cosby was ultimately selected by Mr. Bonner from the competitive list to fill the position of State Program Director for Massachusetts.

Prior to filing the position of Massachusetts State Program Director, Mr. Bonner did not know plaintiff and testified that he had met William Cosby only once in the Spring of 1984 when the two spoke for only a few minutes. During that chance meeting, Mr. Cosby and Mr.

Bonner did not discuss the position of Massachusetts State Program Director. Affidavit of William Cosby, Defendant's Exhibit # 14.

Plaintiff's SF-171 application and Applicant Appraisal Form were signed by her former supervisor, Harold McQuiston. Mr. McQuiston rated plaintiff "exceptional" (highest rank available) for "Knowledge of the principles and practices of supervision and ability to supervise a staff of 3 to 5 employees; Ability to identify, analyze, and develop solutions to problems; Ability to develop and carry out long and short range goals and objectives; Experience reviewing and evaluating work performance of individuals or an organization for accuracy and conformance to guidelines; and Skill in analyzing needs, developing and presenting information for an intended audience." Plaintiff's Personal Qualification Statement, Plaintiff's Exhibit 12 at page 12. Mr. McQuiston rated plaintiff as "above average" (second highest rating available) for "Knowledge of budget development and management: and Skill in public speaking and in relating to the public." *Id.* Mr. McQuiston stated on this Appraisal Form that "While I was Deputy Regional Director and Temp. Regional Director (Kansas City Region) I considered Marjorie my top State Director. She is prompt, hard working and works well with all staff." *Id.* The first page of plaintiff's Personal Qualifications Statement notes that she served as a State Program Director from 1975 until 1981. At the time of the application, plaintiff had not been a State Program Director for nearly three years. *See* Plaintiff's Exhibit # 12.

Mr. Cosby's Applicant Appraisal form was signed by Mr. Torian, as "Present Immediate Supervisor, Former

Immediate Supervisor and Former 2nd Level Supervisor." Mr. Torian rated Mr. Cosby as "Exceptional" in all seven categories. It is clear from Mr. Cosby's Personal Qualification Statement that at the time he applied for Massachusetts State Program Director, he was employed as the Acting State Program Director for Massachusetts, and prior to that assignment, he was a State Program Specialist for Massachusetts. Both positions officed in Boston, Massachusetts. At the time of the application, Mr. Cosby had nearly ten years of experience with ACTION and he was currently employed by ACTION. *See* Defendant's Exhibit # 6.

In June of 1984, prior to his application to permanently fill the position, Mr. Cosby had been appointed Acting State Program Director for Massachusetts. This assignment was done by temporary promotion according to the Negotiated Agreement between ACTION and the Action Employees' Union, Article XII, Section F, which requires "[a]n employee detailed to a higher grade position for more than twenty-nine (29) days will receive a temporary promotion." The FPM states that an employee should not be given a detail to a higher level position, but rather should be given a temporary promotion. *FPM*, Chapter 300-21, Subchapter 8, ¶ 8-4e. The Request for Personnel Action Form (Defendant's Exhibit # 3) refers to Mr. Cosby's move from State Program Specialist to State Program Director as a promotion. ACTION Order 335.4, ¶ 7.f, states that any temporary promotion for less than 120 days need not be effected through internal merit staffing procedures.

Mr. Cosby's affidavit states that he did not talk to Mr. Bonner about being named Acting State Program Director

in Massachusetts, but rather he called the then Director of ACTION, Thomas Pauken, when another Program Specialist was initially named Acting State Program Director. Mr. Cosby stated that he thought it was ACTION policy to name the senior person in the State Office as Acting State Director and since Mr. Cosby was the senior person in the Boston, Massachusetts office, he felt he should have been named Acting State Program Director. Shortly after his conversation with Mr. Pauken, Mr. Cosby was named Acting State Program Director.

When Mr. Cosby was the Acting State Program Director, his supervisor was Mr. Torian, the Regional Director. When Mr. Cosby was the State Program Specialist in Massachusetts, Mr. Torian was his second line supervisor. Mr. Torian and Mr. Bonner each signed the Request for Personnel Action form assigning Mr. Cosby to the position of Acting State Program Director in Massachusetts.

D. Statistical Evidence and the Affirmative Action Plan

At the time of the selection of the State Program Director for Massachusetts, ACTION had a 1982-86 Affirmative Action Plan which had been accepted by the Equal Employment Opportunity Commission ("EEOC"). For purposes of determining underrepresentation, the Plan looked at job-by-job classification series and not at specific jobs. The position of State Program Director is in the 301 job series and is not the only job in that series. The Plan breaks down the job series by race and sex, i.e., Black male (BM), White male (WM), Black female (BF), and White female (WF), but not by male and female

generally. The plan shows no underrepresentation for black females in the 301 job series. Eight percent of the females in the 301 job series were held by black females as compared to 4.75 percent of the Civilian Labor force.

The figures in the 1982-86 Plan were produced based upon the information available in 1982 when the plan was developed. This included estimates from the 1980 census. At that time, 39.6 percent of the GS-11 and GS-12 grade employees were female and 23.1 percent of the GS-13-15 employees in ACTION were female. As estimated by the 1980 census, the civilian labor force at this time was 44 percent female. The court notes that the 44 percent figure includes the civilian equivalent of grades 1-18. Nancy Voss, ACTION Director of EEO, stated that for purposes of determining a statistical difference, the 44 percent female civilian labor force figure is not comparable to the 39.6 percent female labor force at ACTION because the 39.6 percent ACTION figure is a specific grade grouping of GS-11 and GS-12 employees while the 44 percent civilian labor force figure is a general grouping that represents the equivalent of grades 1-18.

In 1984, at the time of the vacancy announcement for the position of Massachusetts State Director, 41 percent of the females in grade GS-12 employed by ACTION were eligible to apply for that position. As noted earlier, the actual applicant pool was comprised of four women and six men. For purposes of determining statistical significance, the 41 percent of females in Grade GS-12 eligible to apply for the position is not comparable to the 44 percent figure of females in the civilian labor force because the

41 percent figure represents a specific grade grouping of GS-12 females at ACTION while the 44 percent civilian labor force figure is the general grouping which represents the equivalent of grades 1-18. Additionally, the 44 percent female civilian labor force figure was an estimated figure based upon the 1980 Census. The final female civilian work force figure for the relevant period was approximately 32 percent.

The 1982-86 Affirmative Action Plan did not require that the plaintiff be hired for the position of Massachusetts State Program Director. The FPM, Chapter 335-4, 1-4, Requirement 4, requires that selection procedures provide for management's right to select from appropriate sources. ACTION is not required to select from any particular source but may utilize appropriate sources, including Office of Personnel Management ("OPM") certificates. An OPM certificate is a list of candidates provided by the Office of Personnel Management. The vacancy announcement at issue was not advertised through an OPM certification. Mr. Bonner did not realize that plaintiff was not an ACTION employee when he reviewed her SF-171 application. Although plaintiff testified that there were five instances of vacancy announcements advertised ACTION-wide where non-ACTION applicants were considered, in each of those cases an OPM Certificate was used to obtain candidates. There was no evidence that indicated when a position was advertised solely ACTION-wide, ACTION selected a non-ACTION employee. From February 2, 1983 until the selection at issue in September, 1984, seven out of nine vacancy announcements were issued ACTION-wide and two were issued nationwide. Defendant's Exhibit # 31.

Prior to the selection of Mr. Cosby in September of 1984, ACTION had appointed five females to positions of State Program Director either by reassignment, detail or temporary promotion. Plaintiff did not allege that ACTION violated any Affirmative Action plan or goals in her complaint filed on December 20, 1984. In fact, in a May 2, 1991 Order, Judge Hunter found that the plaintiff "disavowed any intention of making this the basis for her claims of . . . gender discrimination." May 2, 1991 Order at page 9.

II. CONCLUSIONS OF LAW

The sole issue before the court is whether ACTION's reasons for not selecting plaintiff for the position of Massachusetts State Program Director were a pretext for disparate treatment based upon plaintiff's sex. Establishing a *prima facie* case of disparate treatment requires the plaintiff to show that she belongs to a protected group, that she applied for and was qualified for the job for which the employer was seeking applicants, that despite her qualifications she was rejected and that thereafter the employer continued to seek applications from persons of plaintiff's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If the employer is silent in the face of the establishment of a *prima facie* case, then there is a presumption that the employer unlawfully discriminated against plaintiff. The employer may, however, rebut the presumption by producing evidence that "plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

Once the employer "produces evidence (whether ultimately persuasive or not) of nondiscriminatory reasons" for the conduct at issue, the employer has met its burden of production. *St. Mary's Honor Center, et al. v. Hicks,* 61 U.S.L.W. 4782, 4784 (U.S. June 22, 1993). The burden then shifts to plaintiff to produce evidence that the employer's proffered reasons "are not the true reasons for the employment decision," and rather, an illegal reason was the true reason. *Burdine,* 450 U.S. at 256. The "ultimate burden of persuading the [trier of fact] that [she] has been the victim of intentional discrimination" remains at all times with the plaintiff. *Id.*

ACTION first contends that plaintiff cannot make out a *prima facie* case because she was not eligible for employment under the vacancy announcement. Specifically, ACTION argues that the vacancy announcement at issue limited the area of consideration to ACTION-wide, which means the pool of applicants is limited to those who are currently employed by ACTION. ACTION asserts that plaintiff was neither a current or temporary employee of ACTION at the time she made her application for the position of Massachusetts State Program Director. The court finds this argument without merit.

First, the "area of consideration" is "the area in which the agency makes an intensive search for eligible candidates in filling a vacancy through competitive procedures." FPM 335-3, Subchapter 1, 1-2(e), Defendant's Exhibit 18. The court believes the "area of consideration" is not a disqualifying limitation on those who may apply, but rather a requirement in competitive selections that ACTION advertise the vacancy sufficiently broadly to

obtain an adequate number of qualified applicants. Plaintiff, as "reinstatement eligible," could have been appointed without the competitive announcement. Plaintiff also had "status" by virtue of her reinstatement eligibility. Chapter 10 of ACTION Order 335.4 provides that outside applicants with non-competitive eligibility may be given concurrent consideration with ACTION employees. ACTION's rules also provide that ACTION-wide is the "minimum" area of consideration for selection of state directors and that the selecting official may expand the area of consideration. ACTION Order 335.4, Chapter 2, ¶ 9(b)(3), Defendant's Exhibit 4. Furthermore, the plaintiff presented evidence that ACTION has considered persons not employed by ACTION for positions advertised as ACTION-wide in seven cases. Plaintiff's Exhibit # 31. The court finds that in light of the above information, even if it was determined that plaintiff was not eligible because the vacancy announcement was listed as ACTION-wide, it is possible that this requirement could have, and likely would have, been waived for plaintiff in accordance with the agency's policy of filling "all competitive service positions by selection from among the best qualified candidates and through appropriate merit staffing processes and procedures . . . that will assure an adequate supply of well qualified candidates for consideration." ACTION Order 335.4, Chapter 1, ¶ 2, Defendant's Exhibit 4. Therefore, the court finds that ACTION's contention that plaintiff failed to make a *prima facie* case because she was not qualified under the requirements of the ACTION announcement for the position she was seeking is without merit.

Under the analysis of *McDonnell-Douglas*, the court finds that plaintiff has made a *prima facie* case in that she demonstrated that she is a member of the protected group (female), she applied for and was qualified for the position of Massachusetts State Program Director, she was rejected, and thereafter the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications. The burden now shifts to ACTION to demonstrate it declined to hire plaintiff for a "legitimate, nondiscriminatory reason." *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 256. The court notes that ACTION need only meet its burden of production, and then plaintiff must demonstrate that ACTION's proffered reasons are not the true reasons and ACTION intentionally discriminated against plaintiff. *St. Mary's Honor Center et al. v. Hicks*, 61 U.S.L.W. at 4784.

ACTION asserts that it hired Mr. Cosby, rather than plaintiff, because Mr. Cosby was better qualified than plaintiff. The vacancy announcement for the position of State Program Director for Massachusetts stated that ACTION needed someone able to direct all ACTION projects within the state of Massachusetts, and maintain contact with state and local governments and agencies, as well as community organizations concerning ACTION projects. ACTION Vacancy Announcement, Defendant's Exhibit # 5. The evidence at trial showed that Mr. Cosby, as a State Program Specialist in Massachusetts, worked and developed ACTION programs for the state of Massachusetts. Further, in his position as State Program Specialist in Massachusetts, Mr. Cosby would have been familiar with the state and local governments of Massachusetts with whom he would be working. Specifically,

Mr. Bonner, the selection official, testified that Mr. Cosby had current knowledge about the economy and programs in Massachusetts. Mr. Bonner also stated that Mr. Cosby's Form 171 showed a "rather remarkable" depth of community spirit. In summary, the court believes that Mr. Cosby was well qualified for the position of Massachusetts State Program Director.

It is true that the law prohibits discrimination based upon impermissible factors, but the law does not require that an employer exercise the best possible judgment or demand that an employer give preferential treatment to minorities or women. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 259. The employer may choose among equally qualified candidates, provided that the selection is not based upon unlawful criteria. *Id.* In the instant case, the court believes that the evidence showed that the selection of Mr. Cosby was not based on unlawful criteria, rather ACTION exercised its discretion to pick the candidate it believed was the best qualified. Therefore, the court finds that ACTION has articulated a neutral reason for hiring Mr. Cosby and has met its burden of production.

Plaintiff must now prove by a preponderance of the evidence that the proffered reason was pretextual and that ACTION intentionally discriminated against plaintiff because of her sex. *Id.* at 253. A plaintiff may show pretext by persuading the court that a discriminatory reason more likely motivated the employer or by showing that the offered reason is not worthy of credence. *Id.* at 256. Thus, plaintiff in the instant case must show that ACTION's reason for not hiring her was motivated by her

sex. Plaintiff must demonstrate that ACTION intentionally discriminated against her because of her sex. *McIntosh v. Weinburger,* 810 F.2d 1411, 1419 n.2 (8th Cir. 1987).

Plaintiff first argues that the evidence showed that she was more qualified for the position than Mr. Cosby and this demonstrates pretext. The court believes this argument is without merit. The vacancy announcement required an applicant to have one year of required experience at the next lower grade level (GS-12), three years of general experience and specific experience. Each candidate that was referred to the selecting official, Mr. Bonner, met these requirements. The fact that plaintiff had longer service in the agency and that she had been a GS-13 for over six years does not mean that she was better qualified than Mr. Cosby. Rather, this fact only means that she was at this particular level in ACTION, and no inference may be made that indicates she was better qualified for this particular position merely because of length of service in ACTION. Also, the fact that plaintiff had more experience as a State Program Director does not indicate to the court that she was better qualified for the position at issue. The court notes that plaintiff was the Missouri State Program Director. Missouri obviously is a different state in an entirely different region of the country from Massachusetts. Additionally, plaintiff had not been employed as a State Program Director for the three years prior to her application for the Massachusetts State Program Director position.

Similarly, the fact that Mr. Cosby was subject to a one-year probation while plaintiff would not have been had she been chosen for the position, does not indicate to

the court that plaintiff was better qualified. The waiver of the one-year probationary period is merely reflective of an employee's prior status as a Grade 13 employee. It is not an indication of suitability for the position.

Likewise, the fact that Mr. Cosby was required to be rated by a panel in order to apply for the position, while plaintiff was eligible without competitive examination and rating, does not indicate that plaintiff was more competent. Rather, the rating and exam were required of Mr. Cosby solely because he had not been employed at Grade 13 for the period of time required to avoid competitive examination. FPM, Subchapter 2, Defendant's Exhibit # 19.

In summary, the court believes that plaintiff's contention that she was better qualified than Mr. Cosby and that therefore ACTION's stated reasons for failing to hire her are pretextual is unsupported by the evidence and without merit.

Plaintiff also contends that Mr. Cosby was preselected and groomed for the position at issue by Mr. Bonner who directed the detail and temporary promotion of Mr. Cosby to Acting State Program Director. Plaintiff asserts that this was done at the expense of the then Acting State Program Director, Malcolm Coles, thus giving Mr. Cosby a competitive advantage over other candidates. The court finds this argument speculative at best. The evidence did not show that Mr. Cosby's temporary promotion to Acting State Program Director in Massachusetts gave him any competitive advantage in qualifying for the position. Moreover, there was no evidence Mr.

Cosby would not have qualified for the position regardless of the three-month temporary promotion.

Plaintiff further contends that ACTION failed to follow its own regulations when it temporarily promoted Mr. Cosby as Acting State Program Director. Plaintiff cites ACTION's failure in this regard as evidence of grooming and pre-selection of Mr. Cosby for the position of Massachusetts State Program Director. Plaintiff is correct in her assertion that ACTION regulations require a temporary promotion be given to an employee, such as Mr. Cosby, who is detailed to a higher grade level position for more than 29 days. However, the evidence in this case indicates that the paperwork involved in Mr. Cosby's move to Acting State Program Director indicates he received a temporary promotion. Additionally, assuming *arguendo* that ACTION failed to follow its own internal procedures and regulations regarding personnel matters, such a failure does not necessarily amount to evidence of pretext. *McIntosh v. Weinberger,* 810 F.2d 1411 1430 (8th Cir. 1987).

Plaintiff also claims that evidence of pretext was established through the testimony at trial which she claims indicates Mr. Bonner did not seriously consider plaintiff's application. The court does not agree with plaintiff's evaluation of the evidence in this regard. When asked if he remembered particular facts about plaintiff – such as whether she had been a State Program Director in the past, her past ratings, and whether she had been part of a RIF – Mr. Bonner stated that he did not remember. The court finds it of no moment that Mr. Bonner did not remember specifics, or even generalities, about plaintiff. The selection process occurred approximately eight years before this matter proceeded to trial. Also, at the time of

plaintiff's application, Mr. Bonner was the selecting official for the entire state of Massachusetts. The court finds it entirely reasonable that Mr. Bonner would not remember specific details regarding one application out of many he reviewed. Accordingly, the court believes this argument is without merit.

Plaintiff next argues that the 1981 RIF presents evidence of a pattern of discrimination against plaintiff and other females. Specifically, plaintiff states that evidence of the intentional discrimination and pretext include: (1) displacing plaintiff instead of the Kansas State Program Director; (2) failing to recognize plaintiff's reemployment right to the Missouri State Program Director position upon Mr. McQuiston's retirement; (3) detailing Byrnes as the Missouri State Program Director upon the retirement of McQuiston; (4) extending Byrnes' detail for one and one-half years in violation of the 120-day limitation, thereby extending the detail beyond the two-year period of plaintiff's reemployment priority rights; (5) failing to advise plaintiff of, or consider her for, two vacancy announcements for State Directors occurring during her two-year period of reemployment priority rights; and (6) withdrawing a third vacancy announcement after plaintiff learned of the announcement and applied for the position.

The court concludes that the evidence in this case did not show that ACTION intended to discriminate against plaintiff or other females through the 1981 RIF. The court notes that over 200 people throughout ACTION were displaced in the 1981 RIF, including four state program directors, two males and two females. Plaintiff's position was not abolished. Rather, she was displaced by Mr.

McQuiston when *his* position was abolished. There was no evidence that ACTION abolished Mr. McQuiston's position in order to affect plaintiff. In fact ACTION offered plaintiff another position which would have allowed her to maintain her grade and pay level. Plaintiff declined this offer and left ACTION. The court finds no evidence of intentional discrimination against plaintiff by ACTION at the time of the RIF.

ACTION did not fill the position vacated by Mr. McQuiston upon his retirement in 1982. Rather, it directed the Kansas State Program Director to perform the duties in Missouri in addition to his regular duties until early 1985. An employer is not under any obligation to fill vacancies as they occur and ACTION acted fully within its rights in choosing to leave the position vacant.

Plaintiff also argues that ACTION should have broadened the definition of competitive area, as it applied to her at the time of the RIF, to include Topeka, Kansas. The testimony at trial did not support this contention. The definition of competitive area was applied uniformly nationwide during the 1981 RIF. There was no evidence that the definition of competitive area could have been, or should have been changed on a case-by-case basis. Rather, the scope of the competitive area is negotiated between the Union and ACTION management prior to a RIF. Thus, the court finds no evidence of intent to discriminate against plaintiff in this regard.

Finally, plaintiff argues that ACTION's asserted reasons for not hiring her for the position of Massachusetts State Program Director were pretextual as evidenced by

statistical data indicating the existence of a "glass ceiling", that is, underrepresentation of females in managerial positions at ACTION. The court finds this argument to be unpersuasive.

First, the evidence did not establish that ACTION violated the 1982-86 Affirmative Action Plan. The Plan did not indicate underrepresentation of females in the job series which included State Program Directors. That being the case, and inasmuch as the Plan had no recruitment goals for black females in that job series, ACTION's failure to consider the Plan did not constitute an actionable violation.

Second, to establish pretext through statistical data, a plaintiff must show the existence of a disparity between men and women in selection rates for a particular job. Proof of the disparity itself is based upon a comparison of those women eligible for selection who were actually selected with the corresponding proportion of eligible men who were actually selected. *Palmer v. Schultz*, 815 F.2d 84, 90 (D.C. Cir. 1987). Thus, the statistical analysis must focus on the appropriate labor pool to properly establish discrimination.

The court finds that although plaintiff put forth some statistical evidence, that evidence is not competent to infer discrimination in this case. Plaintiff's statistical evidence revealed that at the time the 1982-86 Affirmative Action Plan was formulated, 39.6 percent of GS-11 and GS-12 employees in ACTION were female and 23.1 percent of grades 13-15 were female. However, there was no evidence which indicated how many of that group would have been eligible to apply for the position at issue,

assuming they still worked for ACTION in 1984. "If a statistical analysis of selection rates is premised on a faulty calculation of the number of men and women who are eligible for selection, as a result, for example, of a misunderstanding of the eligibility criteria, the statistical conclusions lose much of their probative force." *Palmer v. Schultz,* 815 F.2d at 91, n.6. Further, although plaintiff sought to compare these two figures to the 44 percent figure of females employed in the Civilian Labor Force, the evidence at trial showed that the 44 percent female figure was based upon a broader universe which included the equivalent of grades 1-18. The court therefore concludes that no statistically significant comparison can be made.

The evidence indicated that at the time of the 1984 vacancy announcement for the Massachusetts State Program Director, 41 percent of the females in Grade 12 employed by ACTION would have been eligible to apply for the position of Massachusetts State Program Director. No evidence was introduced concerning the number of eligible GM-13 female candidates. The testimony from Ms. Beaulieu indicated that the 41 percent of eligible females in Grade 12 could not be compared to the figure of 44 percent female employment in the Civilian Labor Force to determine significant statistical difference because the 44 percent female figure for the Civil Labor Force was based upon a group comprised of the equivalent of Grades 1-18. Additionally, the evidence showed that the actual Civil Labor Force figure for female employment was subsequently determined to be 32 percent.

The court notes that plaintiff did produce statistical evidence concerning the number of female State Program Directors selected between 1981 and the Massachusetts selection and statistical evidence concerning the number of females selected as State Program Directors between the Massachusetts selection and 1991. However, plaintiff did not establish who made up the pool of applicants for those positions and accordingly, the court may not infer discrimination on this basis. Additionally, plaintiff did not produce evidence concerning the number of men eligible at any grade within ACTION for any particular position. Therefore, the court believes that no comparison may be made between eligible men selected and eligible women selected.

In summary, the court finds that while plaintiff made a *prima facie* case of sex discrimination, ACTION articulated a neutral reason for its hiring decision. The court finds that plaintiff has failed to show that the reason articulated by ACTION was pretextual and not worthy of credence. Most importantly, the court finds that plaintiff failed to prove that ACTION *intentionally* discriminated plaintiff on the basis of her sex.

For these reasons, it is

ORDERED that plaintiff Marjorie Jackson's claim for sex discrimination against defendant Jane Kenny, in her official capacity as Director of ACTION is DENIED and

that judgment be entered in favor of defendant Jane Kenny.

/s/ John T. Maughmer
John T. Maughmer
Chief United States
Magistrate Judge

Date: September 24, 1993

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3817WMKC

Marjorie K. Jackson,

Appellant,

v.

James A. Scheibel, etc.,

Appellee.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 5, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit